

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVERNO MARCEL EVANS,

Defendant-Appellant.

UNPUBLISHED

July 1, 2004

No. 246944

Wayne Circuit Court

LC No. 02-010873-01

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316, assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of life imprisonment without parole for the murder conviction, 285 months to 50 years' imprisonment for the assault conviction, and three to five years' imprisonment for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We vacate defendant's conviction and sentence for assault with intent to rob while armed, but affirm in all other respects.

I. Basic Facts

Defendant's convictions arise from the shooting death of an eighty-three-year-old man shortly after he withdrew money from a bank. The prosecution's theory was that defendant intentionally struck the victim's vehicle with his own vehicle as part of a "bump and rob scheme" and then attempted to rob the victim when the victim got out to assess the damage. The victim was shot as he turned to run back to his vehicle, but was able to drive himself to a police station where he provided an account of the incident and a description of both the suspect and the suspect's car, a black sedan. The victim died three days later from a single gunshot wound to the abdomen.

Shortly after the victim was shot, the police received a report of an individual abandoning a vehicle that matched the description of the suspect's vehicle in the vicinity of the shooting. A short time later, two women were observed going through the car, retrieving items from it, and closing the windows. The police arrested those women, one of whom was defendant's sister. Among the items found in the women's possession and taken from the abandoned vehicle was

defendant's identification. Defendant was later arrested and gave a statement to the police in which he claimed that the victim struck his car first and that the victim was shot accidentally while the two men were fighting.

II. Motion to Suppress Defendant's Custodial Statement

Defendant argues that the trial court erred in denying his motion to suppress his custodial statement. We disagree.

A trial court's ultimate decision on a motion to suppress evidence is reviewed de novo. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). "However, the trial court's underlying findings of fact are reviewed for clear error." *Id.*

A. Probable Cause

Defendant first argues that the trial court should have suppressed his custodial statement because his warrantless arrest was made without probable cause. As this Court stated in *People v MacLeod*, 254 Mich App 222, 227-228; 656 NW2d 844 (2002):

A custodial arrest is permitted if an arresting officer possesses enough information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996), citing MCL 764.15. "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id.*

We disagree with defendant's claim that the police lacked sufficient information to connect him to the charged offense. The police had sufficient information to connect the abandoned black sedan to the offense based on the victim's account and the visible damage to both the black sedan and the victim's car. Additionally, the police learned that defendant had asked his sister to retrieve paperwork for the vehicle that included defendant's identification.¹ This information was sufficient to give the police probable cause linking defendant to the victim's shooting.

It is immaterial whether the officers who arrested defendant had personal knowledge of the crime. As noted in *MacLeod*, *supra* at 228, an officer making an arrest can rely on both his own personal knowledge and reasonably trustworthy information from another source to support an arrest. Here, the arresting officers had reasonably trustworthy information from the investigators who worked on this case. See also MCL 764.15(1)(b), (c), and (d).

¹ Although the evidence at the evidentiary hearing and at trial varied with regard to whether the black sedan was registered to defendant, we find this conflict immaterial in light of the identification materials for defendant.

Defendant also claims that the police illegally arrested him only for the purpose of questioning. See *People v Kelly*, 231 Mich App 627, 633-634; 588 NW2d 480 (1998). We find no support for this argument in the record. On the contrary, the record demonstrates that defendant was arrested based on probable cause linking him to the charged crime.

B. Voluntariness

Defendant also challenges the trial court's decision denying his motion to suppress his statement to the police on the ground that it was involuntary. As this Court explained in *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); [*People v*] *Daoud*, [462 Mich 621, 632-639; 614 NW2d 152 (2000)]. A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, *id.* at 633, and must be the product of an essentially free and unconstrained choice by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *Daoud, supra* at 634.

The voluntariness of a defendant's statement is determined by the conduct of the police. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). The following factors are considered:

"The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

"The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." [*Id.* at 373-374, quoting *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).]

Defendant argued below that his statement was involuntary because he was under the influence of drugs and alcohol at the time he gave his statement, was threatened by the officer who took the statement, and was beaten by other unidentified officers. Defendant further claimed that the officer who ultimately took his statement misled him into believing that she was his attorney. The officers involved denied abusing, threatening or misleading defendant. The

officers additionally testified that there was no indication that defendant was under the influence of drugs or alcohol.

Resolution of this issue hinges on the credibility of the witnesses at the suppression hearing. The trial court found that defendant's version of events was not credible, whereas the officers' testimony was credible. This Court gives deference to the trial court's assessment of the weight of the evidence and the credibility of the witnesses. *Shipley, supra* at 373. The trial court is in the best position to determine credibility. *Daoud, supra* at 629. Defendant has failed to show that the trial court's assessment of the witnesses' credibility was clearly erroneous. Accordingly, we reject this claim of error.

III. Substitute Counsel

Next, defendant argues that the trial court erred in refusing to grant his motion for substitute counsel. We review the trial court's decision for an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

Before the start of trial, defendant informed the court that he was dissatisfied with his attorney and wanted a new attorney. He complained that his appointed attorney failed to prepare a defense and failed to investigate certain matters. Defense counsel assured the court that he was prepared for trial and planned to raise matters that defendant wanted argued at trial. Counsel further indicated that he would have requested that the court grant the funds necessary to hire an investigator if one was necessary. The trial court refused to appoint new counsel, but gave defendant the option of retaining his own lawyer, representing himself, or proceeding with his current attorney.

An indigent defendant is guaranteed the right to counsel, but he is not entitled to counsel of his choice simply by requesting that his appointed counsel be replaced. The appointment of substitute counsel at public expense is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Mack, supra* at 14. Good cause exists where there is a legitimate difference of opinion between the defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.* The trial court is in the best position to decide if the facts establish "good cause" for the appointment of substitute counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

In this case, defendant failed to provide specific information about what counsel failed to do. Mere allegations about a defendant's lack of confidence in his trial counsel do not constitute good cause for substitute counsel. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). Defendant has not shown that the trial court abused its discretion in denying his request for substitute counsel.

IV. Felony Murder

Defendant next argues that his felony murder conviction must be vacated because the predicate felony on which the conviction was based, assault with intent to rob while armed, is not a recognized predicate felony in MCL 750.316(b)(1). We disagree.

Defendant failed to preserve this issue with an appropriate objection in the trial court. Therefore, appellate relief is foreclosed absent a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

This Court recently rejected this identical argument in *Akins*, *supra* at 547, explaining:

The most significant issue presented on appeal is whether assault with intent to rob while armed is a proper underlying felony to support defendants' felony-murder convictions. We hold that it is. Under MCL 750.316(1)(b), felony murder includes murder committed in the perpetration of, or attempt to perpetrate, inter alia, a robbery. Because a person who commits assault with intent to rob while armed also commits the necessarily included lesser offense of attempted armed robbery, which is a well-established predicate felony under the felony-murder statute, we conclude that assault with intent to rob while armed is also a predicate felony under the felony-murder statute. Accordingly, we affirm defendants' felony-murder convictions.

Accordingly, defendant has failed to show plain error.

V. Assault with Intent to Rob While Armed

We agree with defendant that it is necessary to vacate his conviction of assault with intent to rob while armed. Under the state constitution, a defendant may not twice be placed in jeopardy for a single offense. Const 1963, art 1, § 15. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). It is well established that convictions and sentences for both felony murder and the predicate felony constitute multiple punishments for the same offense and thereby violate double jeopardy protections under the state constitution. *Id.* The underlying felony is a necessary element of every conviction of felony murder. *People v Wilder*, 411 Mich 328, 346; 308 NW2d 112 (1981). The appropriate remedy for a double jeopardy violation involving felony murder is to vacate the conviction and sentence for the underlying felony. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). Accordingly, we vacate defendant's conviction and sentence for assault with intent to rob while armed.

IV. Ineffective Assistance of Counsel

In a supplemental brief filed in propria persona, defendant argues that defense counsel was ineffective because he failed to move the trial court to appoint an "experienced criminal investigator." We disagree.

To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

We find defendant's argument to be without merit. No evidentiary hearing was held, and there are no errors apparent on the record. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d

866 (2002). Prior to trial, defendant expressed some concern that his counsel failed to sufficiently investigate certain facts and evidence to support his theory that the shooting was accidental. In response, defendant counsel informed the court:

The issues that he wants raised, you Honor, will be raised. They're well within the information that we have already.

* * *

Your Honor, I have all the discovery information. I have the technician's report. I know what they say. I know how to approach –

* * *

I know how to approach the witnesses based on his theory of the case.

During trial, counsel vigorously cross-examined the witnesses and developed defendant's theory that the shooting had been accidental rather than intentional.

On this record, we find that defendant has failed to affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Nor has defendant either overcome the strong presumption that counsel's assistance constituted sound trial strategy, or shown that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Affirmed in part and vacated in part and remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly